Supreme Court, U.S.
FILED
AUG 26 1991
OFFICE OF THE CLERK

No. 90-1967

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL CORBITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the five–year statute of limitations established by 18 U.S.C. 3282 barred petitioner's indictment and conviction for racketeering conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 924 F.2d 1362.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1991. A petition for rehearing was denied on March 28, 1991. Pet. App. 13. The petition for a writ of certiorari was filed on June 24, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). The district court sentenced petitioner to 20 years' imprisonment. Pet App. 16. The court of appeals affirmed petitioner's conviction and sentence.[1] Pet. App. 1-11.

1. From 1970 to 1982, petitioner used his position as Chief of Police of Willow Springs, Illinois, to further the goals of a criminal conspiracy. Co-defendant Alan Masters was a lawyer, and co-defendant James Keating was a lieutenant in the Cook County Sheriff's Police Department who commanded the vice squad and later the criminal investigative unit. Until June 1982, when petitioner lost his job as Chief of Police of Willow Springs, Masters regularly bribed petitioner to refer persons arrested, ticketed, or investigated by the Willow Springs Police Department to Masters for legal assistance. Masters had similar kickback schemes with other police officers in the area. From 1972 through August 1984, Masters also was the middleman in a scheme in which illegal bookmakers in Cicero, Illinois, bribed Keating and officers under Keating's command to leave them alone. Pet. App. 2-3.

In 1981 Masters discovered that his wife Dianne was having an affair. After his wife hired a lawyer

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[1] The court of appeals remanded for the district court to make findings regarding the sentences imposed on petitioner's two co-defendants. Pet. App. 9-10. Because that remand did not affect petitioner's sentence, it did not affect the finality of the judgment in petitioner's case.

to file for divorce, and let it be known that she hoped to obtain custody of her four–year–old daughter, Masters installed recording equipment in his home for the purpose of eavesdropping on telephone conversations between Dianne and her paramour. Upon hearing a recorded conversation between Dianne and her paramour that he believed referred to sex play, Masters declared that he would have Dianne killed. Later, Masters told a friend that he would ask Keating to kill her. Keating subsequently offered a former Cook County Sheriff's Police Department officer $25,000 to kill Dianne on Masters' behalf, explaining that petitioner was unwilling to do the killing himself but was willing to dispose of the body. Pet. App. 3.

Dianne Masters disappeared on March 19, 1982. Her body was recovered from the trunk of her car nine months later when the car was discovered submerged in a canal near Willow Springs. She had been beaten and shot. In the following months Keating used his position in the Cook County Sheriff's Police Department to obstruct the investigation of Dianne Masters' disappearance. Masters collected the proceeds of a $100,000 policy on Dianne's life. The evidence at trial showed that petitioner drove the car that carried Dianne Masters' body into the canal where the car and body were found. Pet. App. 3. Petitioner was indicted on federal racketeering charges on June 13, 1988. The indictment charged petitioner with involvement in the bribery, murder, and insurance fraud schemes.

2. On appeal, the court of appeals rejected petitioner's claim that the five–year federal statute of limitations, 18 U.S.C. 3282, barred the June 13, 1988, indictment in this case. The court noted that one of the objects of the conspiracy with which the indict-

ment charged petitioner was "to conceal [the conspirators'] actions involving the murder of Dianne Masters and * * * to participate in such concealment indefinitely." The court noted that, because petitioner did not contend that the agreement to conceal the murder had terminated five years before the indictment, the sole issue was whether petitioner ever entered into such an agreement. Concluding that the evidence supported the jury's finding that such an agreement existed and that petitioner was a party to it, the court of appeals rejected petitioner's claim. Pet. App. 8.

The court of appeals distinguished *Grunewald* v. *United States*, 353 U.S. 391 (1957), and *Krulewitch* v. *United States*, 336 U.S. 440 (1949), cases in which this Court held that efforts to conceal a conspiracy are not automatically deemed part of a conspiracy. The court of appeals explained that it did "not understand these cases to hold that a conspiracy can never include an agreement to conceal the defendants' conduct," Pet. App. 8, and found that here there was "an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self–protection, traces of the crime after its commission," *ibid.* (quoting *Grunewald*, 353 U.S. at 404):

> The conspirators in this case, signally including [petitioner], intended from the first to exert strenuous efforts to prevent discovery of the crime and of their involvement in it; the fact that two of the three conspirators were policemen supports the inference that concealment was part of the original conspiracy and not a spontaneous reaction to fear of arrest and prosecution. It was also a fair inference that the defendants agreed to keep trying to conceal the con-

spiracy for as long as they could, using their official positions where possible.

Finally, the court of appeals rejected the notion that petitioner's termination as Willow Springs police chief automatically worked a termination of the conspiratorial agreement, because he "did not communicate his abandonment to any of his co-conspirators and he did not make a clean breast to the authorities." Pet. App. 9 (quoting *United States* v. *Patel*, 879 F.2d 292, 294 (7th Cir. 1989), cert. denied, 110 S. Ct. 1318 (1990)).

ARGUMENT

Petitioner argues (Pet. 6-16) that the five–year statute of limitations set forth in 18 U.S.C. 3282 barred his prosecution for racketeering.

Petitioner was convicted of racketeering conspiracy. In the case of conspiracies having no overt act requirement, such as racketeering conspiracies, the limitations period is measured by reference to the duration of the criminal agreement, not the particular activities in which each defendant engaged. *Hyde* v. *United States*, 225 U.S. 347, 369-370 (1912); *United States* v. *Grammatikos*, 633 F.2d 1013, 1023 (2d Cir. 1980). The statute of limitations for a charge of conspiracy against a particular defendant does not begin to run until the conspiracy as a whole terminates or until that defendant takes "some act to disavow or defeat the purpose." *Hyde*, 225 U.S. at 369; see *United States* v. *Kissel*, 218 U.S. 601, 608 (1910); *United States* v. *Brock*, 782 F.2d 1442, 1445 (7th Cir. 1986); *United States* v. *Grammatikos*, 633 F.2d at 1023. In the case of a RICO conspiracy, the limitations period therefore runs from the accomplishment or abandonment of the conspiracy. *E.g.*, *United States* v. *Torres Lopez*, 851 F.2d 520, 524-525

(1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989); *United States* v. *Persico*, 832 F.2d 705, 713-714 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); *United States* v. *Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984).[2]

As the court of appeals correctly determined, the objectives of the RICO conspiracy charged in this case were neither accomplished nor abandoned more than five years before the return of the indictment in June 1988. The indictment alleged that petitioner and his co-defendants "agreed to conceal their actions involving the murder of Dianne G. Masters and agreed to participate in such concealment indefinitely." Gov't C.A. App. 12.[3] Moreover, the jury expressly found that petitioner agreed to commit Racketeering Activity Number Four, which continued into August 1984, less than four years before the indictment. See *id.* at 7-8, 10, 149. These

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[2] The rule is different with respect to conspiracy statutes that, unlike the RICO conspiracy statute at issue here, require proof of an overt act; in those cases, the limitations period runs from the date of the last overt act. See, *e.g.*, *Fiswick* v. *United States*, 329 U.S. 211, 216 (1946); *United States* v. *Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984).

[3] Petitioner contends (Pet. 15) that the jury rejected the government's concealment theory, but his discussion relies on the jury's special verdict on the substantive RICO count against petitioner's co-defendants, in which petitioner was not charged, see Gov't C.A. App. 5, 8; the jury's decision not to convict petitioner's co-defendants for the substantive act of concealing the murder of Dianne Masters is not relevant to the question whether petitioner agreed to conceal that murder. The conspiracy count charged that petitioner agreed with Masters and Keating to conceal the murder indefinitely (see Gov't C.A. App. 12, para. 10), and, as the court of appeals held, see Pet. App. 8, the evidence was more than sufficient to establish such an agreement in this case.

findings establish that the conspiracy to which petitioner agreed extended well into the limitations period.

Petitioner first argues (Pet. 7-8) that the statute of limitations for a RICO conspiracy charge should begin to run on the date "when the defendant agrees to conduct or participate in the affairs of the enterprise and agrees to the commission of two predicate acts," because "at that point * * * the RICO conspiracy is complete." But the mere agreement to form the conspiracy does not complete the operations of the conspiracy; as Justice Holmes explained for this Court: "It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it." *Kissel*, 218 U.S. at 607. When a conspiratorial agreement contemplates a continuing course of activity with no pre-arranged termination point, "the conspiracy continues up to the time of abandonment or success." *Id.* at 608; see Pet. 9 (acknowledging that the courts of appeals have adopted this rule).

Petitioner also argues (Pet. 10-11) that this Court should grant certiorari to adopt the novel position asserted by Judge Newman in his separate opinion in *Persico*, 832 F.2d at 721-722. Judge Newman argued that a RICO conspiracy prosecution should be deemed timely only where both the overall enterprise conspiracy and a conspiracy to commit at least one of the specified predicate acts continue into the limitations period. But even Judge Newman's rule would not benefit petitioner, because the jury expressly found that petitioner agreed to Racketeering Activity Number Four, which continued into the limitations period. See Gov't C.A. App. 7-8, 10, 149. Moreover, neither the Second Circuit nor any other court of appeals has adopted Judge

Newman's proposed test for establishing the limitations period for a RICO conspiracy.

Finally, petitioner contends (Pet. 12-15) that the decision below conflicts with this Court's decision in *Grunewald* v. *United States*, 353 U.S. 391 (1957), which held that "a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." *Id.* at 402. As the court of appeals noted, however, *Grunewald* did not adopt a blanket rule barring prosecutions for conspiracies to conceal illegal acts. Instead, that case merely required some proof of an "express original agreement among the conspirators to continue to act in concert in order to cover up * * * traces of the crime." *Grunewald*, 353 U.S. at 404. As the court of appeals explained, Pet. App. 8-9, the evidence in this case adequately established the existence of such an agreement. In any event, there is no reason for this Court to review the fact–bound application of *Grunewald* to the evidence introduced by the government, and found persuasive by the jury, in this particular case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/45045